STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2001B111

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD RODERICK,

Complainant,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT,

Respondent.

Hearing was held on June 12 and July 5, 2001, before Administrative Law Judge Mary S. McClatchey. Respondent was represented by First Assistant Attorney General Stacy L. Worthington. Complainant was represented by Charles F. Kaiser.

PRELIMINARY MATTERS

Witnesses

Respondent called the following witnesses: Darlene Thompson, Labor and Employment Specialist IV, Division of Unemployment Insurance ("DUI"), Colorado Department of Labor and Employment ("DOLE"); Stephanie Ann Cullen, Labor and Employment Specialist IV, Manager of Training and Development, DUI; Carol Harr, Labor and Employment Specialist II, DUI; Cynthia Janette (Janet) Spiker, Labor and Employment Specialist Trainer, DUI; and Donald Bruce Peitersen, Director of the Division of Unemployment Insurance.

Complainant called the following witnesses: Carol Kimminau, Labor and Employment Specialist II, DUI; Jeremiah Attridge, Labor and Employment Specialist II, DUI, and himself. Complainant also submitted Stipulations Regarding Ian Conant's Testimony, who was unavailable to testify in person or by telephone.

Exhibits

Respondent's Exhibits 15, 16, 18, and 19 were admitted by stipulation. Respondent's Exhibits 12 and 13 were admitted by stipulation for the sole purpose of demonstrating Respondent's progressive discipline of Complainant. Exhibits 10 and 11 were admitted without objection. Exhibits 1 - 6, 8, and 17 were admitted over objection. Exhibits 7 and 9 were admitted over objection for the sole purpose of demonstrating they were considered by the appointing authority in rendering his decision. Exhibit 14 was admitted over objection for the sole purpose of demonstrating notice of the contents thereof to the appointing authority.

Complainant's Exhibits B - G were admitted by stipulation. Exhibit B is a large drawing of the floor on which Complainant's work area is located, and is not to scale.

Procedural Matters

Motion for Continuance. Complainant filed a motion to continuance the hearing for the purpose of conducting a psychological evaluation of Complainant. He sought to present expert testimony on his psychological condition at the time of the actions that led to his termination. In support of his motion, Complainant argued that since Respondent has relied on the "willful misconduct" portion of Board Rule R-6-9(2) as grounds for terminating Complainant, under Barrett v. University of Colorado, 851 P.2d 258 (Colo. App. 1993), it must demonstrate that Complainant acted "deliberately." A psychologist could arguably rebut this.

Respondent countered that the only issues before the Board are whether Complainant committed the acts that led to his termination, and whether the termination decision was arbitrary, capricious, or contrary to rule or law, and that Complainant's psychological condition has no bearing on either of these issues.

Complainant's motion was denied on grounds that the information sought by Complainant was irrelevant to this proceeding. While Complainant's psychological condition might shed light on why Complainant committed some of the acts alleged, it would not prove or disprove whether he did engage in those acts. The reasons why Complainant committed certain acts have no relevance herein. Further, the Board's inquiry into whether the appointing authority's decision was arbitrary, capricious, or contrary to rule or law must be based exclusively on what the appointing authority knew at the time of the termination decision. Any information explaining or mitigating Complainant's actions made available during hearing, after the termination, is irrelevant to that inquiry. Lastly, Barrett no longer governs Rule R-6-9, since the Board has amended Rule R-6-9 to eliminate the requirement of proving an "intentional" violation of a rule.

Motion for Security. Complainant also filed an Objection to Respondent's Security Arrangements. Following a procedural order issued by the Board, Respondent filed a Motion for Security, and Complainant filed a Response to Respondent's Motion for Security. Respondent requested that an armed Colorado State Patrol Officer be present in the hearing room, basing its request on Complainant's documented history of angry outbursts at work and Respondents' witnesses' discomfort in appearing at hearing without security present.

Complainant made several arguments opposing Respondent's motion for security. First, he asserted that the primary threat to safety at any hearing is from a firearm. To be effective, a security system must screen everyone entering the Board premises each time they enter. Complainant states that the overriding reason he opposed the motion for security is to bring attention to the fact that the entire Fourteenth Floor of the Chancery Building needs neutral and effective security in the form of a metal detector and security guard to operate it, identical to the district courts in Denver. He notes the gravity of the cases heard by the Board and the Division of Administrative Hearings, involving loss of job, loss of professional license, loss of public benefits, and other significant issues.

The undersigned granted Respondent's motion for security. While a neutral security system utilizing a metal detector would be ideal on the 14th Floor of the Chancery Building, this issue is an administrative and fiscal one, beyond the authority of this ALJ.

Complainant further argued that the presence of security would be prejudicial to him, because it would cause the ALJ to conclude he is dangerous or violent, and that this conclusion would deprive Complainant of his due process right to a hearing free of bias. The undersigned rejected this argument on grounds that concerns regarding prejudice are applicable only to jury situations (all cases cited by Complainant involved criminal trials and were therefore inapplicable). The ALJ also made a finding that the presence of security in the hearing would not in any way prejudice her against Complainant.

Complainant contended that providing an officer in the hearing room offers nothing more than the illusion of safety, again citing firearm danger as the most serious threat. However, there are a number of reasons for providing security. An important part of the ALJ's role is to assure an orderly hearing room and a comfortable environment for participants. A security presence furthers this goal by deterring disruptive, threatening, or harassing behavior, since it increases the negative consequences of such behavior.

Complainant also argued that Respondent had failed to prove that he presents a threat of violence. The undersigned reviewed the case law cited by Complainant, and additional cases on the subject of security. There is no standard for the Board to apply to the motion for security; no specific evidentiary threshold must be met.

It is the Board's position that no proof of a specific threat of violence must be demonstrated to warrant security at its hearings. In civil district court, when a party requests extra security in the courtroom, it is arranged without question or evidentiary inquiry. In this era of increased workplace violence, the Board has a duty to provide security when requested. The reason for requiring a motion or some type of notice to the Board and the other parties is two-fold: to assure that the use of security is not being abused or used for some improper purpose; and to promote cooperation between the parties.1

Motion to Dismiss. At the close of Respondent's case in chief, Complainant moved to dismiss the case. Complainant argued that Respondent's workplace violence policy, relied on in terminating Complainant, was unconstitutionally overbroad and therefore rendered the termination contrary to law. Respondent countered that the overbreadth doctrine did not apply to the rule at issue since it covers only conduct, not speech, and since the case law applies only to statutes, not to internal agency rules. Complainant further argued that the individual that terminated him did not have proper appointing authority, in violation of Colorado Constitution, article XII, section 13(8).

The motion to dismiss was denied. A law is overbroad if it burdens conduct protected by the First Amendment. Board of Education of Jefferson Co. v. Wilder, 960 P.2d 695, 702 (Colo. 1998). At the close of Respondent's case, there was no evidence that its Departmental Letter concerning Workplace Violence Prevention, DL (ADM) 00-07 burdened protected speech. (See Discussion section below.)

Article XII, section 13(8) of the Colorado Constitution mandates that classified employees shall be hired or fired by appointing authorities, who are defined in section 13(7) as the heads of each principle department or the heads of divisions. The individual who terminated Complainant, Donald Peitersen, was the head of the Unemployment Insurance Division at DOLE. Therefore, he had express constitutional appointing authority to discipline Complainant. Even if he had not been the division director, section 14(3) of article XII gives the Board unlimited authority to promulgate rules. Board Rule R-1-5, 4 CCR 801, empowers appointing authorities to "delegate any and all human resource functions," including the imposition of disciplinary actions. Department and Division heads manage and administer enormous state agencies; it is sound management practice to empower lower level managers to impose discipline.

1 The Board has since amended its security policy.

MATTER APPEALED

Complainant appeals his termination from employment on April 23, 2001. For the reasons set forth below, Respondent's action is affirmed.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;

3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant, Richard Roderick, commenced employment with DOLE in 1984. From 1994 through his termination, he was a Labor and Employment Specialist II in the Unemployment Insurance Division responsible for taking unemployment claims by telephone, and adjudicating those claims.

2. Complainant opposed the dress code, which prohibited wearing jeans to work. He felt the policy was applied in a manner discriminatory to men, and inconsistently among work units. He made his opinion known to others at work, including managers. Others shared his aversion to the policy.

3. On April 12, 2001, the Unemployment Insurance Division threw a party for its entire staff to celebrate the tenth anniversary of its telephone intake system (taking claims by telephone), which is now a national model. The party was designed to be an all-day event, with food located on a number of floors to encourage employees mix with each other during breaks. Part of the festivities involved each work team dressing up in costume.

Thompson Incident

4. Darlene Thompson, L & E Specialist IV, supervises Complainant's work team, and has been Complainant's direct supervisor since August of

1996.

5. On the day before the party, April 11, 2001, Thompson sent Complainant's work team two email messages reiterating that no jeans were allowed at the party, even in costume.

6. This upset complainant, as he had planned to dress up in a motorcycle rider's outfit, including jeans. (He rides a motorcycle in his spare time.)

7. After receiving Thompson's email, at the end of the workday, Complainant went to her office and confronted her about it. He asked if it was true jeans were not allowed, and she said yes.

8. Complainant became angry and agitated, and his face got red. He started yelling, his voice rose to a 7 on a 10-point scale. He said he was sick and tired of rules, and that they were not the same for everyone, or words to that effect. As he yelled he flung his arm to the other side of the building, indicating that the other work team would be wearing jeans to the party.

9. Thompson explained that she tried to get management's permission to wear jeans, but failed, and said she could only be responsible for her team.

10. During this incident, Thompson was frustrated because Complainant was holding her responsible for what the rest of the building may or may not do, and she had no control over other teams.

11. Thompson had experienced Complainant becoming angry and aggressive [loud, red-faced] about issues at work in the past. Thompson had suggested to Complainant on five or six previous occasions that he get counseling for his inability to control his anger. He had responded that he knew his problems and that counseling would not assist him.

12. Thompson did not deem the April 11 incident important enough to write up. However, after learning of Complainant's three additional incidents on April 12, she felt the four incidents together warranted disciplinary action.

Cullen Incident.

13. Another team in the Division was not alerted to the "no jeans" policy for the party, and the entire team dressed up as telephone technicians, wearing jean overalls.

14. On the day of the party, April 12, as soon as Complainant saw the team dressed up in jean overalls, he became extremely upset and angry.

15. Stephanie Ann Cullen, L & E Specialist IV, was the supervisor of the training team. On April 12, at approximately 7:40 a.m., just after starting work, she was walking past Complainant's cubicle. She was not wearing jeans.

16. Complainant started to yell at her, stating, "did you see those people wearing jeans? I'm god dam sick and tired of it, it's not going to continue," or words to that effect.

17. Complainant's voice was loud, a 9 on a 10-point scale. He was very angry and agitated, red-faced, and he pointed his finger at the other end of the building as he yelled.

18. Cullen said she'd look into it, and left.

19. Cullen had been a co-worker of Complainant in the early 1990's, and had been his direct supervisor for three years in the mid-1990's. She had had many contacts with him in which he was either mildly or greatly agitated. Sometimes he would stay agitated about an issue for a week or two at a time. Complainant's periods of agitation were disruptive to the workplace.

20. Based on her history with Complainant, Cullen felt that the management team needed to monitor Complainant's behavior that day.

21. Cullen therefore informed Larry McCann, Complainant's other supervisor, about the incident. She reported that he was visibly agitated and suggested that McCann keep an eye on Complainant.

Harr Incident.

22. Carol Harr is a L & E Specialist II who works on a different floor than Complainant. On the day of the party, during her morning break between 9 and 10 a.m., she took her camera down to the second floor, where Complainant works. She was wearing the jean overall costume.

23. Complainant saw Harr down the hall from him as she entered his floor. She was approximately 20 feet from him. He yelled at her immediately, "See, that's what I'm talking about." He pointed his finger at her and

shook it as he yelled. His voice was an 8.5 - 9 on a 10-point scale.

24. Harr was startled, intimidated, and scared of Complainant during this encounter. She immediately left the floor because she did not want to have a confrontation with him. Her heart was beating fast. She returned to her desk.

25. As Harr walked away form Complainant, she heard him continue to speak in a very loud voice, but did not hear what he said.

26. Harr felt Complainant was out of control and that his outburst was completely inappropriate in the workplace. She did not feel physically threatened or that he would take physical action against her.

27. Harr did not consider reporting the incident. She felt, "Richard has had an outburst. I just wanted to get away."

28. Later that day, she mentioned the incident to a co-worker. The incident did bother her.

Spiker incident.

29. Cynthia Janette Spiker is an L & E specialist trainer. On the day of the party, she was wearing a 19th Century full-length dress. She was not wearing jeans.

30. Spiker walked into the second floor break room, where Complainant and Ian Conant were sitting together. Complainant was heatedly complaining to Conant that one team was getting away with breaking the dress code, while the rest couldn't do so. Conant felt that Complainant was getting more upset than he needed to be if this was the only issue he was concerned about. Complainant's gestures were animated and his voice was elevated. Instead of arguing with him, Conant just "let him go" on about it.

31. Spiker filled up her water bottle, and made a statement, aloud but to herself, in response to Complainant's complaints about the dress code, implying that he was overreacting to an insignificant issue.

32. Complainant responded to Spiker by shouting at her, with his eyes focused right on her. He shouted about managers' inconsistency in enforcing the dress code, and not being allowed to wear jeans. His voice

was an 8 on a 10-point scale.

33. Spiker said, "Take it easy Richard, I have a dress on," or words to that effect. He remained upset, and said something about not being able to wear a dress. He was angry, his face was "beet red," and he looked to Spiker as though he "was going to explode."

34. Since Complainant was closer to the door than she was, Spiker waited for him to leave. As soon as he left, she did. He continued to shout as he walked down the hall.

35. Spiker was frightened by this incident. She had had a previous encounter with Complainant which had also scared her. In the previous encounter, during a staff meeting in 1995, she had said something that set him off, and he had gotten upset enough to cause her to fear him.

36. If the previous event had not occurred, Spiker would not have felt scared and threatened by the April 12, 2001 incident. She simply would have thought it was strange behavior.

37. Spiker did not report the April 12 incident on the same day it occurred, since she felt it would be futile, on the basis of management's lack of response to her 1995 complaint about Complainant.

38. However, after discussing it with her husband that night, she decided to report it, and did, on the next morning.

39. On April 13, 2001, Spiker reported the incident to her supervisor, Stephanie Cullen, telling her that she was scared of Complainant.

40. Once Cullen heard from Spiker (apparently she also heard from Stevensen, who was with Spiker), Cullen decided that the situation with Complainant was out of hand. She felt it was her responsibility to take action to assure there was no violence in the workplace, to elevate the situation to a management level.

41. Cullen emailed Thompson and McKenna [Complainant's supervisors] about her own April 12 encounter with Complainant as well as that of Spiker, suggesting that something should be done to relieve employees' fears.

42. Thompson had experienced Complainant getting angry and aggressive

about issues at work in the past, and believed that the four incidents demonstrated that he was out of control.

Peitersen Investigation

43. Donald Peitersen, Director of the Unemployment Insurance Division, was Complainant's appointing authority. He interviewed six individuals on April 19, 2001, during which he took contemporaneous notes.2

- Spiker reported that Complainant was "highly agitated and yelling/screaming at her. He directly looked her in the eye and proceeded to berate her about the inconsistency of management dealing with the jeans issue. He acted as if she should do something about it. Richard's demeanor and attitude scared her and she exited as quickly as she could. She has had previous encounters with Richard of a similar nature, irrational behavior, which make her very nervous." (Emphasis in original)

- Jean Stevenson, who entered the break room with Spiker, reported that Complainant was "in a highly agitated state, confronting Janet with raised voice and red face. She was not scared by Richard's actions and didn't understand how this issue could cause such a reaction by Richard."

- Ian Conant reported that Complainant was having a "tirade" about the jeans issue, was highly agitated and using a loud voice. Conant "was concerned that Richard's behavior would be threatening to those who did not know him as well as Ian does";

- Harr reported that "as he saw her, [he] pointed at her was agitated (very angry), red face[d] and said something to the effect that you are one of the problems. Carol was extremely upset and scared by the incident and left immediately. She did not want to return to that area of the building for fear of being accosted by Richard. Later in the afternoon, she did go back to the area. Did see, and talk with Richard with no further incident."

- Cullen reported that Complainant was highly agitated, used a loud voice, had a red face, and said that "he wasn't going to let this happen

2 Peitersen copied the notes he took after each interview onto a summary sheet on the same day. That summary was admitted as Exhibit 17, and is the source of the information quoted below.

- anymore."

44. In his summary of these interviews, Peitersen noted that "several staff has expressed concern about their safety when Richard has these episodes. Some react that is just Richard being Richard."

Rule R-6-10 Meeting.

45. At the April 20, 2001 pre-disciplinary meeting with Peitersen, Complainant was accompanied by his union representative. An off duty police officer was in attendance.

46. At the meeting, Complainant admitted that all of the incidents had taken place, but denied having used a loud voice or having acted in an intimidating way.

47. Complainant also stated that he recognizes he has a problem in dealing with people and letting his anger overtake him, that he needs to work on controlling his anger, and that he could understand how someone could perceive him as intimidating. Complainant's representative stated that Complainant had come to terms with the realization that he needed long-term counseling, and offered to start such counseling. Peitersen asked why this time was different, since Complainant had offered to get counseling in the past, and had in fact done so in the past year as required by the previous disciplinary action. Complainant responded that this time it is for myself because I realize I need it.

48. Complainant offered to apologize to all concerned for the inappropriateness of his behavior.

Complainant's Prior Disciplinary and Corrective Actions

49. On December 2, 1985, Complainant received a Corrective Action letter for displaying a "less than cooperative attitude with your supervisor," among other issues.

50. On January 20, 1993, Complainant received a Corrective Action stating in part: "On two separate occasions you have either left the job prior to your scheduled time or called in to take emergency annual [leave] when feeling frustrated, angry or upset about work related issues. . . If you are unable to deal with these feelings of frustration or they continue to interfere with your coming to work, I recommend C-SEAP as one source of guidance."

51. On February 9, 1994, Complainant received a Corrective Action stating in part: "On several different occasions I have talked with you regarding your need to utilize positive communication and interaction skills to ensure feelings of frustration and/or anger do not interfere with your doing your job. There have been four occasions within the last three months." The letter describes in detail two episodes in which Complainant became agitated and failed to utilize listening or interaction skills in dealing with a conflict, and in which he spent significant time "venting," which made it impossible for him to get his work done. In one episode, "the discussion became very heated and at one point you stood up, pointed your finger in my face and continued to yell at me about issues over which I had no control." In another episode, Complainant admitted having told a claimant to "get off of his 'DUFF' and do something for yourself."

52. The letter concluded, "I am extremely concerned that these demonstrations of combative behavior are increasing and are seriously interfering with your ability to provide total quality and customer service. . . I encourage you to seek assistance. I recommend C-SEAP as once source of guidance. It is extremely important you understand that any further incidents of this kind will result in my recommending disciplinary action."

53. On March 7, 1997, Complainant received a disciplinary action. It stated in part as follows:

> "The basis for the disciplinary meeting was a report of investigation submitted by the Department's Investigations and Criminal Enforcement (ICE) Section in response to your allegations that incidents of workplace violence had occurred against you on two separate occasions (September 28, 1995 and November 7, 1996). After conducting extensive interviews with eleven individuals who were witnesses to these incidents, the report concluded that you were, in fact, the instigator/aggressor in both cases. It is noted that each of the witnesses stated that you were the instigator/aggressor.
>
> During our meeting, you did not dispute the findings in the report. However, you did offer that over the last couple of years you had been experiencing difficulty in interacting with the individual involved. This difficulty would get you frustrated to the point that you would lose your temper. You further stated that, after reading the findings in the report, perhaps your behavior had been inappropriate.
>
> As we discussed, this is not the first time that your aggressive behavior has been discussed with you. Over the past several years, you have had several conversations with management concerning your aggressive and, sometimes, violent behavior toward department employees. . . While it is recognized that you have made improvement in controlling your temper and actions when dealing with Department employees, I am still very concerned that instances such as these continue to occur.

> . . . I would strongly recommend that you seek assistance in learning how to more effectively control your temper and anger when interacting with others. Such assistance is available from . . . CSEAP."

54. Peitersen withheld one day of pay, and offered Complainant administrative leave in order to utilize the counseling services of CSEAP.

55. On September 14, 2000, Complainant received another disciplinary action. Complainant disagreed with the decision of a co-worker on a matter he had previously worked on, and changed the decision after it had been issued. When confronted about this prohibited practice, he became intimidating, raising his voice to yelling, pounding his finger on the desk, shaking his finger in the face of a manager, and making "inappropriate and intimidating remarks which were meant to cast [aspersion] on members of the benefits management team. Among other things, you asked that the issue be taken to 'only the male members of the benefits management team.' . . . Your general demeanor was described as extremely agitated and very intimidating. In fact, the incident was so intimidating to Ms. Ringer that she chose not to come to work the next day as she was uncertain as to what you would do."

56. Peitersen stated, "I find that your behavior towards management and co-workers was completely inappropriate and unacceptable. On numerous occasions over the years you have been counseled by management concerning similar such behaviors. While I believe that you have worked hard on trying to control such behavior, I can not, and will not, tolerate such continuing behavior. I am also very concerned about your actions to override a decision that had already been made on a claim."

57. Peitersen suspended Complainant without pay for four days and required him to obtain anger management counseling to resolve his behavioral issues as a condition of continued employment.

58. Peitersen concluded the disciplinary action letter by stating, "I am advising you that any similar behavior problems in the future will result in immediate disciplinary action and, most likely, your termination from employment."

Complainant's Evaluations

59. In 1988 and 1989, Complainant was rated Standard. He was complimented on always volunteering to assist coworkers. In "Areas for

Development," he was informed in 1989 he needed to "develop interpersonal skills to facilitate communication/interaction processes with co-workers as well as when involved in group projects."

60. In 1990 Complainant was rated Good and was again complimented on volunteering to assist coworkers. In the vast majority of categories, he was rated Good. However, he was rated "Needs Improvement" overall in Interpersonal Relations and on two Communications categories. He checked "agree" on the evaluation.

61. In 1991 Complainant received a Good rating. He was rated Good in all Interpersonal Relations categories except for one Needs Improvement rating. He received one Needs Improvement rating in "Conveyed a positive and professional image of the agency to others."

62. Complainant was rated Good in 1992. He received an overall Needs Improvement rating in Interpersonal Relations.

63. In 1993 Complainant was rated Good. He received two Needs Improvement ratings in each of the Communications and Interpersonal Relations categories. He received two Commendable ratings in Organizational Commitment.

64. In 1994 Complainant received a Commendable rating. The evaluation stated, "Richard has been the most eager employee I've ever had." He received no Needs Improvement ratings.

65. In 1995 and 1996 Complainant received Commendable ratings, with no Needs Improvement ratings.

66. In 1997 Complainant received a "Met Expectations" rating.

67. In 1998 Complainant received an "Exceeded Expectations" rating.

68. In 1999, Complainant received an "Exceeded Expectations" rating. He received a "Did Not Meet Expectations" rating in "demonstrates tact and diplomacy in any negotiations or confrontations with others."

69. The portions of Complainant's 2000 evaluation in evidence are nearly impossible to decipher, but they reveal no problems with his performance.

Peitersen's Decision

70. Peitersen reviewed Complainant's personnel file prior to making his decision.

71. After interviewing the six witnesses, Peitersen did not feel it was necessary to interview anyone else that may have been present when the incidents occurred.

72. Peitersen took the weekend to consider his decision. He considered as primary the fact that he had two employees that feared for their safety and well being due to Complainant's behavior, Spiker and Harr.

73. He also focused on whether another disciplinary action would cure the problem, or whether Complainant would simply end up in another disciplinary situation.

74. Peitersen concluded that if he did not terminate Complainant, he would simply end up engaging in the behavior again and Peitersen would have to discipline him a fourth time.

75. Peitersen concluded that Complainant had violated section (4) the agency's workplace violence policy, in his conduct towards Harr and Spiker. That policy defines workplace violence as

> "Conduct in the workplace against employees, employers, or outsiders . . . [which] may include but not be limited to: (1) physical acts against persons or their property, or against CDLE property; (2) veiled or direct verbal threats, profanity or vicious statements that are meant to harm and/or create a hostile environment; (3) written threats, profanity, vicious cartoons or notes, or other written conduct that is meant to threaten or create a hostile environment; or (4) any other acts that are threatening or intended to injure or convey hostility."

76. Peitersen also concluded that Complainant had engaged in willful misconduct under Board rule R-6-9(2), because he had been warned repeatedly for years, through corrective and disciplinary actions, that his conduct towards others at work was inappropriate and felt to be intimidating, but he did not cease the behavior. Complainant had continued to engage in a pattern of prohibited behavior despite his knowledge that further discipline would result.

77. On April 23, 2001, Peitersen sent a termination letter to Complainant. He described Complainant's conduct towards Thompson and Cullen as

demonstrating, "through your physical demeanor and loud voice, a great deal of anger and agitation." He further stated, "Later that morning, you had two other similar instances involving co-workers in which your behavior left them scared and intimidated by your anger and agitation."

78. Complainant seeks rescission of the discipline, reinstatement, back pay, and an award of attorney fees and costs.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may reverse or modify Respondent's decision only if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. McPeak v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996).

Credibility

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. Metro Moving and Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995).

Respondent's witnesses were generally very credible. Each of the four descriptions of Complainant's conduct were very similar; yet the four women all worked on different work units, even on different floors. They had no reason or opportunity to conspire against Complainant.

Harr presented as a soft-spoken individual who attempted at hearing to downplay the seriousness of the incident, rather than to exaggerate it. A week following the incident, she reported to Peitersen that Complainant was agitated, red-faced, had pointed at her and said something to the effect that she was one of the problems, and that she was very upset and scared by the incident. At hearing, four months later, her testimony was nearly identical, but she never stated that she was scared. She testified that Complainant was yelling at her at 8.5 or 9 on a 10-point

scale, that she felt "startled" and "intimidated," that "my heart was beating fast," that "he was out of control," that he "was not treating me appropriately for the workplace," and that it was "totally inappropriate." However, she did not attempt to inflate the incident into something it was not.

Spiker testified that she was scared by Complainant's outburst, and that if she hadn't had a previous similar encounter with him she would simply have found his behavior to be strange. This testimony is corroborated by a number of sources. First, Jean Stevenson, an eye witness, told Peitersen that Complainant was "in a highly agitated state, confronting Janet [Spiker] with raised voice and red face." On the day after the incident, Spiker reported to Cullen that she was "scared after a confrontation by Richard." A week later, Spiker reported to Peitersen that Complainant was highly agitated and yelling/screaming at her, looked her directly in the eye, and berated her about the inconsistency of management dealing with the jeans issue. She reported that his demeanor and attitude scared her. Spiker was definitely frightened by her encounter with Complainant, and at hearing she did not attempt to exaggerate it.

Complainant testified that the volume of his voice was "normal" when talking to Conant in the break room before Spiker entered. However, Complainant's own witness, the stipulated testimony of Ian Conant, corroborates Spiker's testimony and rebuts that of Complainant. Conant testified that "complainant was getting more upset than he needed to be if this was the only issue he was concerned about . . . Complainant's gestures during the conversation were animated and his voice was elevated."

While Complainant acknowledged in his testimony that each incident occurred, he testified that his voice was "somewhat raised," at a 6 on a 10-point scale, only by virtue of the distance between himself and the others. While he admitted that he was agitated and frustrated on the morning of April 12, 2001, he nonetheless insisted that he was not yelling or shouting during any of the encounters. Spiker, Harr, and Conant all effectively rebut this testimony. Complainant was therefore less credible than Respondent's witnesses.

A. Complainant Committed the Acts for Which He was Disciplined

Complainant committed the acts for which he was disciplined. With respect to Harr and Spiker, he lashed out at both of them, yelling, red-faced, pointing his finger right at Harr and waiving his arms at Spiker. He was angry and out of control. His behavior was threatening to each of them to the point that they both felt afraid of him.

Respondent's policy defines workplace violence in part as "acts that are threatening or intended to injure or convey hostility." While Complainant may not have intended to convey hostility, he failed to control his behavior, and his acts were

unmistakably threatening to Harr and Spiker. He violated the policy.

The undersigned has no question that Complainant regrets his actions and never sought to threaten or frighten Harr or Spiker. However, that does not change the fact that he engaged in the behavior, or that it had a traumatizing effect on his co-workers.

Complainant's conduct towards Thompson and Cullen was also inappropriate, intimidating, and aggressive, appropriately subjecting him to disciplinary action.

Board Rule R-6-9(2) provides that reasons for discipline may include "willful misconduct or violation of these or agency rules or law that affect that ability to perform the job." Complainant's conduct towards all four women constitutes willful misconduct. He had been corrected three times and disciplined twice for nearly identical behavior. Peitersen's September 14, 2001 disciplinary action had warned Complainant, "On numerous occasions over the years you have been counseled by management concerning similar such behaviors. While I believe that you have worked hard on trying to control such behavior, I cannot, and will not, tolerate such continuing behavior . . . I am advising you that any similar behavior problems in the future will result in immediate disciplinary action and, most likely, your termination from employment."

Despite receiving such an ultimatum from Peitersen, seven months later Complainant lashed out inappropriately at two supervisors and verbally attacked to co-workers with such vehemence that they feared him. Complainant's failure to heed Respondent's repeated directives constitutes willful misconduct.

B. The Discipline Imposed Was Within the Range of Alternatives Available to the Appointing Authority.

Complainant was a strong performer for DUI. After a string of Good ratings in the late 1980's and early 1990's with Needs Improvement ratings in Interpersonal Relations, he received consistently Commendable ratings through the 1990's with no mention of interpersonal or behavioral issues.

During this same period, however, Respondent used the progressive discipline system to attempt to get Complainant's behavior under control. In January, 1993, Complainant received a corrective action for leaving the worksite on two occasions because he allowed himself to get angry and upset about work related issues. In February, 1994, Complainant received another corrective action for four similar incidents in a three-month period. In one episode, Complainant stood up, pointed his finger in his supervisor's face, and yelled at her regarding issues over which she had no control. In another, Complainant admitted to having told a claimant to "get off his duff and do something for yourself." The letter indicated that Complainant's "combative

behavior" was increasing.

In March, 1997, Complainant received his first disciplinary action. He had made complaints of being the victim of workplace violence. After extensive interviews, all eleven witnesses indicated that Complainant had been the instigator/aggressor. In the pre-disciplinary meeting, Complainant did not dispute the findings, but indicated he had difficulty with the individual involved, got frustrated to the point that he lost his temper, and realized after reading the report that perhaps his behavior had been inappropriate.

This experience, of initiating a complaint and then, upon reading the investigative conclusions, finding that he, rather than the other individual, was the instigator and aggressor, should have confirmed to Complainant that he had great difficulty understanding his own behavior and its effect on others at work. It should have raised a red flag that he has a serious problem. Instead of addressing it as suggested through counseling, he elected to ignore it.

In 2000, Complainant's behavior was so aggressive and intimidating and that an employee decided not to come in to work the next day for fear of what he might do next. This is an extremely serious situation. It is unreasonable for any agency to allow an employee to be so intimidating that it causes another employee to not come into work. Considering the seriousness of the incident, Peitersen's disciplinary action of a four-day suspension and required counseling was a muted response. It demonstrated Peitersen's real appreciation for Complainant's attempts to improve, and his desire to assure Complainant's future success. In addition to attempting to assure his success, Peitersen also appropriately held Complainant accountable by warning him that if he continued to be unable to control his behavior, termination would likely result.

When, in April of 2001, after counseling, Complainant lashed out at two additional managers and was so aggressive with two co-workers that they feared him, it was more than reasonable for Peitersen to remove Complainant from the workplace. It would have been unreasonable for Peitersen to return an employee to the workplace who had acted so aggressively in an eight-month period (September 2000 to April 2001) that three employees feared for their well-being.

Complainant was encouraged at least a dozen times verbally and in writing to seek counseling for his failure to control his behavior, and required to do so once as a condition of employment. He made an informed choice not to work hard to change his behavior.

Agency managers cannot allow the workplace to become a place of fear for any employee. State employees have the right to a workplace free of fear. They also have the right to work in an environment free of verbally aggressive and intimidating assaults

such as those Complainant repeatedly engaged in. Peitersen's progressive approach to disciplining Complainant for conduct that caused fear and intimidation in his co-workers was necessary and appropriate.

It is noted that at the pre-disciplinary meeting, Complainant offered to apologize to all four women, and to seek long-term counseling for his anger problem. Peitersen considered this compelling information prior to making his decision. In view of the long history of corrective and disciplinary action for identical behavior, it was reasonable for Peitersen to conclude that it was not in the best interests of the agency to give Complainant another chance.

C. Respondent's Action was Not Arbitrary, Capricious or Contrary to Rule or Law.

Complainant argues that Respondent's workplace violence policy is unconstitutionally overbroad. A law is overbroad if it burdens conduct protected by the First Amendment. Board of Educ. Of Jefferson Co. v. Wilder, 960 P.2d 695, 702 (Colo. 1998).

Complainant avers that his speech was protected by the First Amendment (but does not claim that he was discharged in retaliation for exercising that right.) A public employee's speech is protected by the First Amendment if it relates to a matter of public concern. David v. City and County of Denver, 101 F.3d 1344 (10th Cir. 1996), *rehearing denied*, *certiorari denied,* 118 S.Ct. 157.

In determining whether a statement involves a matter of public concern, the fundamental inquiry is whether the employee speaks as an employee or as a citizen. Id. Public employees' speech relating to internal personnel disputes and working conditions ordinarily will not be viewed as addressing matters of public concern. Id. In distinguishing between a public employee's speech that addresses a matter of public concern and that which does not, the court is to consider the motive of speaker to learn if the speech was calculated to redress personal grievances, and therefore spoken as an employee, or to address a broader public purpose, and therefore spoken as a citizen. Id.

Complainant sought to wear jeans and chaps to a party at work. He believed, with good reason, that management was inconsistently applying its dress code, since he was prohibited from wearing jeans on April 12 while an entire work team was allowed to do so. This issue relates to internal personnel policies and working conditions. It is not one of public concern. His speech was not protected by the First Amendment.

Complainant nonetheless still has standing to challenge Respondent's workplace

violence policy. Overbroad laws may be challenged even by parties whose speech is not protected by the First Amendment. Wilder, 960 P.2d at 703. To be unconstitutional, a law's overbreadth must be substantial, meaning that the burden on protected speech is substantial as compared with the burden on unprotected speech. Wilder, 960 P.2d a 703.

As noted above, the facts of this case demonstrate that Respondent's policy has not burdened any protected speech. Although invited to do so by Complainant, this judge will not speculate as to whether Respondent's policy might, at some time in the future, substantially burden protected speech. A facial review of the policy reveals that it prohibits acts, not conduct. Further, it is an open question as to whether the overbreadth doctrine applies to an internal agency policy, as opposed to a statute.

Complainant also argues that he was provided insufficient notice that his employment was in jeopardy, due to the absence of any mention of performance problems in his strong performance evaluations over the past several years. This argument would have merit if he had not been progressively disciplined. Peitersen's September 2000 disciplinary action stated, "While I believe that you have worked hard on trying to control such behavior, I cannot, and will not, tolerate such continuing behavior . . . I am advising you that any similar behavior problems in the future will result in immediate disciplinary action, and, most likely, your termination from employment." Respondent put Complainant on notice that his employment was in jeopardy.

Complainant contends that Peitersen's investigation was arbitrary and capricious because he failed to interview other employees that may have been present during the incidents on April 11 and 12, 2001. Complainant avers that without this corroborating information, Peitersen did not have sufficient evidence to conclude definitively that Complainant had committed the acts alleged. Complainant states that there were numerous other employees in his work area during the incidents, who could either verify or deny that they heard Complainant yelling at the level Respondent's witnesses testified to. He cites the lack of any other employees coming forward as evidence the incidents did not occur as Respondent contends.

Complainant cites Hughes v. Department of Higher Education, 934 P.2d 891 (Colo. App. 1997) in support of his argument. In Hughes, the Court of Appeals, in discussing the arbitrary and capricious standard of proof, noted that an agency's "failure to gather, hear, and consider evidence required by statute is materially different from the failure, if failure there be, to gather, hear, and consider evidence, the consideration of which is discretionary." Id., 934 P.2d at 895.

Here, Board Rule R-6-6 sets forth the factors Peitersen had to consider in

rendering his disciplinary action. It states, "The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information offered by the employee must also be considered." State Personnel Board Rule R-6-6, 4 CCR 801.

Complainant offered mitigating information at the pre-disciplinary meeting. Peitersen considered it over the weekend. Complainant did not inform Peitersen that he knew of witnesses to the incidents that had a version different from the six individuals Peitersen interviewed. While Peitersen did have a duty to consider mitigating circumstances, when an appointing authority has six nearly identical reports from different employees who do not work together, that is sufficient corroboration of the evidence. In such a situation, the appointing authority had no duty to randomly interview potential witnesses in search of mitigating evidence.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined;

2. The discipline imposed was within the range of available alternatives;

3. Respondent's action was not arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of August, 2001, at Denver, Colorado.

_____
Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch

paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of August, 2001, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Charles F. Kaiser
1801 Broadway, Suite 110
Denver, Colorado 80202

and in the interagency mail, addressed as follows:

Stacy L. Worthington
First Assistant Attorney General
Personnel and Employment Law Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203

_____